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No. 91-924

In The

Supreme Court of the United States

October Term, 1991

DAYAL PARDASANI,

Petitioner,

vs.

SIEMENS ENERGY AND AUTOMATION, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Should the United States Supreme Court re-evaluate factual disputes which have been resolved by the United States District Court for the Southern District of Mississippi and affirmed by the Court of Appeals for the Fifth Circuit?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Siemens Energy and Automation, Inc. ("Siemens"),[1] respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on August 28, 1991.

[1] Respondent Siemens is owned by Siemens Corporation of Delaware, which in turn is owned by Siemens A.G. of Germany.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported, but is included herein at Appendix A, p.1a. The Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Mississippi were also not reported, but are included at Appendix B., p.1b.

STATEMENT OF THE CASE

For the sake of brevity, Respondent adopts and incorporates by reference the facts of the case as set forth in the District Court's Findings of Fact and Conclusions of Law. Because of the numerous errors in Petitioner's version of this document (Pet., App. 25-App. 60)[2], Respondent has reproduced the District Court's findings and conclusions at Appendix B, pp.1b-19b. As required by Supreme Court Rule 24.2, the following is submitted to point out inaccuracies and omissions in Petitioner's Statement of the Case.

Petitioner misrepresents to the Court that it was a United States Magistrate who dismissed Petitioner's claims of religious discrimination, defamation, intentional infliction of emotional distress and violation of 42 USC § 1981 pursuant to Respondent's Motion to Dismiss.

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[2] "Pet." refers to Petitioner's Petition for Certiorari and is followed by the page number cited, either in his brief or the Appendix. "App. A" or "App. B" references the appendix of Respondent's Brief in Opposition followed by the cited page numbers.

(Pet. 5). In fact, it was U.S. District Court Judge Tom S. Lee who ruled on Respondent's Motion and dismissed these claims. (App. A, p.5a).

Petitioner states that the dismissal of plaintiff's claims of religious discrimination, defamation, intentional infliction of emotional distress, and violation of 42 USC § 1981 was appealed. (Pet. 5). To the contrary, only the trial court's dismissal of Petitioner's national origin discrimination and retaliation claims was appealed. (App. A, p.6a).

Petitioner's Statement of the Case presents what the Petitioner wishes the trial court had found. Petitioner's gloss reflects a good employee unfairly treated by his racist boss. Obviously, the District Court found otherwise. To support Petitioner's version of the "facts," Petitioner includes portions of the trial transcript at Pet. App. 109 through App. 175. However, Petitioner's jumbled compilation of this appendix takes portions of the trial testimony out of context and results in a misleading impression of the proceeding. In fact, it is impossible even to ascertain from the appendix what witness was testifying or where the transcript changes from one witness' testimony to another's.

The Statement of the Case and Appendix omit any reference to the substantial record evidence that contradicts his allegations. For instance, Petitioner makes no mention of the favorable treatment and assistance he received from Tommy McLendon when Petitioner's father died. (App. A, p.3a and App. B, pp.5b, 6b).

In his attempt to recast the record before this Court, Petitioner relies extensively on the testimony of Norm

Smith. Petitioner ignores the fact that Norm Smith was forced to resign his employment because of his unsatisfactory job performance and deficient operation of the Data Processing Department. (App. A, p.2a and App. B, p.3b). Accordingly, Petitioner's reliance on Smith's testimony to establish proper company policy, procedure and standards (*see, e.g.* Pet. 10, 11, 12 and 18) is unwarranted.

Petitioner also relies on the alleged statement attributed to Tom McLendon that, "If I get rid of the minorities out there, I'll be hard pressed to hire another one." Petitioner erroneously assumes that this statement is a fact. However, this alleged statement was totally uncorroborated at trial and was denied by McLendon. Obviously, Petitioner is asking this Court to engage in fact finding.

REASONS FOR DENYING THE PETITION

Through his Petition for Certiorari, Petitioner asks this Court to retry this case *de novo*. Petitioner simply disagrees with the factual findings of the trial court which were affirmed by the Fifth Circuit Court of Appeals. This Court has historically declined to give such broad scope to its review. *United States v. Oregon State Medical Soc.*, 343 U.S. 326 (1952); *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949).

This Petition for Certiorari marks Petitioner's third attempt to have the factual findings and legal conclusions of the trial judge overturned. Petitioner initially filed a Motion for a New Trial or for Reconsideration in district

court. Petitioner subsequently appealed to the Fifth Circuit Court of Appeals raising the same issues he now urges upon this Court. Still dissatisfied, he asks this Court to grant certiorari. However, as stated long ago by this Court, "The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923).

1. Petitioner claims that this Court should grant certiorari because the Fifth Circuit Court of Appeals' ruling was in conflict with *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983). *Aikens* teaches that the ultimate factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff – not whether *vel non* a *prima facie* case has been established. *Id.* at 715. Contrary to the Petitioner's contention, *Aikens* does not overturn the widely accepted practice that, as held by Fifth Circuit in *Weissinger v. United States*, 423 F.2d 795 (5th Cir. 1970):

> The trial judge may conclude, as occurred in this case, that it is inadvisable to sustain a defendant's motion midway in the trial and that trial should be completed. The denial amounts to no more than a refusal to enter judgment at that time, a tentative and inconclusive ruling on the question of the plaintiff's proof. It does not preclude the trial judge from making, at the conclusion of the case, findings and determinations at variance with its prior tentative ruling.

Id. at 797-98. *See also Integrated Circuits Unlimited v. E.F. Johnson Co.*, 875 F.2d 1040 (2nd Cir. 1989) ("During the

resolution process the trial judge in a bench trial must be free to reassess the evidence, and to alter or modify its view before final judgment (citations omitted). It should not be – nor is it – bound in any way by its preliminary determinations which, upon further reflection it later concludes were mistaken"); *Harris v. Plastics Mfg. Co.*, 617 F.2d 438 (5th Cir. 1980); *E.V. Prentice Mach. Co. v. Associated Plywood Mills, Inc.*, 252 F.2d 473 (9th Cir. 1958). Motions for involuntary dismissal or directed verdict after the plaintiff rests are standard trial practice, and a defendant is not doomed to ultimate defeat simply because he does not prevail on his motion.

In *Aikens*, the Court was concerned that the parties and the Court had "unnecessarily evaded the ultimate question of discrimination *vel non*." *Aikens*, 260 U.S. at 714. In the instant case, however, that is not a concern, for even though the Court found that Petitioner had not established all the elements of a *prima facie* case of national origin discrimination or retaliation, the Court went further and determined the ultimate question of discrimination. The Court "assumed" that Petitioner had established a *prima facie* case and held that Respondent had not unlawfully discriminated against the Petitioner. (App. B, pp.14b, 16b, and 18b). Accordingly, even if this Court were to agree with Petitioner that the Court erroneously analyzed the existence of a *prima facie* case at the close of the trial, Petitioner could obtain no relief since the ultimate factual issue regarding intentional discrimination was found against the Petitioner.

2. Petitioner, rearguing before this Court his version of the facts, contends that the Courts below should have

used the *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) "mixed-motive" standard. To the contrary, the plain language of the *Price Waterhouse* opinion mandates that, under the facts of *this* case, use of the mixed-motive analysis would be improper. This Court held in *Price Waterhouse* that mixed-motive analysis is not triggered unless and until the plaintiff proves that a prohibited factor "played a motivating part in an employment decision. . . . " *Id.* at 258. Before the *Price Waterhouse* analysis can be utilized, "the plaintiff must show that the employer actually relied on [a prohibited factor] in making its decision." *Id.* at 251; *accord Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989).

In *Price Waterhouse*, the District Court clearly found that sex stereotyping played a part in Hopkins' evaluation as a candidate for partnership. *Id.* at 255. In the case *sub judice*, the Court never found that plaintiff's national origin or the filing of his May 1989 Equal Employment Opportunity Commission charge played any role whatsoever in his discharge. Petitioner's former counsel conceded this in his brief to the Fifth Circuit Court of Appeals:

> Even though the Magistrate found legitimate, non-pretextual reasons for Mr. Pardasani's termination in the instant case, he failed to recognize overwhelming evidence that illegitimate motives played a part in the decision to terminate Mr. Pardasani as well. . . . Had the Magistrate made such a finding, he would have correctly applied the *Price Waterhouse* standards . . .

The lack of this requisite finding is fatal to plaintiff's argument. Realizing this, Petitioner reargues the evidence as if this petition were for a trial *de novo*. As this Court has noted, however, it will not set aside findings of fact unless clearly erroneous, with due regard given to the opportunity of the trial court to judge the credibility of the witnesses. *United States v. Oregon State Medical Soc.*, 343 U.S. 326 (1952). In the case *sub judice*, the trial court considered the testimony of the Petitioner's seven witnesses and the Respondent's six witnesses "including their demeanor and credibility and the relationship of each individual's testimony to that of other witnesses and the exhibits" and thereafter rendered his findings of fact. (App. B, p.2b).

In asking this Court to overturn the trial court's findings as clearly erroneous, plaintiff relies on an alleged statement attributed to Tommy McLendon. As stated above, plaintiff's reliance on this uncorroborated and contested statement is misplaced. Even if the statement were made, which is denied, it still would not prove national origin or retaliation played a motivating part in plaintiff's discharge. *Price Waterhouse v. Hopkins*, 490 U.S. at 251; *Young v. City of Houston, Tex.*, 906 F.2d 177 (5th Cir. 1990) ("stray remarks in the workplace . . . cannot justify requiring the employer to prove that its [employment] decisions were based on legitimate concerns.")

Moreover, as the evidence showed and as the Court found, the decision to discharge the Petitioner was not made by the alleged racist, Tom McLendon. The decision to terminate Petitioner was made by Respondent's Employee and Community Relations Manager, Michael

Goryl, after discussions with other individuals in Respondent's management. (App. A, p.5a and App. B, p. 11b). The Court did not find, nor did the evidence show, that national origin or retaliatory animus played any role in the decision to terminate Petitioner. Accordingly, the *Price Waterhouse* mixed-motive standard never applied to the facts as properly found by the district court and as affirmed by the Fifth Circuit Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARMIN J. MOELLER, JR.
(Counsel of Record)
DAVID M. THOMAS II

December 26, 1991

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1106
Summary Calendar

DAYAL PARDASANI, Plaintiff-Appellant,

versus

SIEMENS ENERGY AND AUTOMATION, INC., Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi
(CA-J89-246(L))

(August 28, 1991)

Before CLARK, Chief Judge, SMITH and WIENER, Circuit Judges.

PER CURIAM:*

I.

Dayal Pardasani appeals from the Magistrate's dismissal of his claims of national origin discrimination and

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

retaliatory termination against defendant Siemens Energy and Automation, Inc. (Siemens). We affirm.

II.

In 1981, Siemens hired Pardasani as a systems analyst. From 1982 through 1985, Pardasani received favorable annual evaluations from his supervisor, the Manager of Information Systems, Norm Smith.

Pardasani's job involved receiving requests from other departments in the company and developing and modifying computer software to meet these requests.

In 1986, Siemens became dissatisfied with Smith and the Information Systems Department. As a result Smith resigned and Siemens appointed Tom McLendon, the most senior employee in the Department, as Acting Manager in charge of the applications side of the Department. McLendon reported to controller Bob Steil.

McLendon and Pardasani had worked together in the same department for years, but had what the Plaintiff terms a "sour relationship."

After only three months as Acting Manager, McLendon was to perform the annual evaluation for Pardasani, due in October 1986. Because he had been supervisor for a short period, McLendon solicited comments and reviews from other supervisors in the company. Based on this information, McLendon completed his evaluation and met with Pardasani to review it. Pardasani refused to accept his evaluation of 2.3 on a 5 point scale, claiming that any unsatisfactory work resulted from improper instructions from the requesting party. As a result of his

poor evaluation, Pardasani did not receive a raise in 1986-87.

Pardasani complained to the Employee and Community Relations Manager Michael Goryl regarding his evaluation. After a meeting between Pardasani, McLendon and Goryl, the evaluation remained the same. Goryl also expressed dissatisfaction with Pardasani's work.

In February 1987, Pardasani requested a leave of absence to go to India and attend his father's funeral and settle his father's affairs. His request was granted. During Pardasani's absence, which extended beyond his accrued vacation time, McLendon made sure that Pardasani received full pay, a $1,000 advance to pay for the airline ticket and participated in a collection to assist Pardasani.

In May 1987, Pardasani filed a claim with the Equal Employment Opportunity Commission (EEOC), alleging age, race and religious discrimination in the denial of a fair evaluation and promotion to senior analyst. In actuality, nobody was ever promoted to senior analyst after McLendon became Acting Manager. Siemens declined to fill the vacancy in order to save money.

Subsequent to Pardasani's evaluation and meeting with Goryl and McLendon, his work performance started to decline, as noted in his personnel file.

In September 1987 Siemens implemented a security system for its computers which limited access to programs in order to prevent more than one analyst from working on a program at one time. At this same time, Siemens also restricted access to ICCF libraries (the actual locations in the computer where the programmer/analyst

would work on changing programs or creating new ones). Both of these changes were implemented at the suggestion of a Price Waterhouse auditor's report regarding the Information Systems Department.

On or about September 21, 1987, Pardasani received an assignment to modify a tag print program. Pardasani repeatedly delayed the due date for the completed project. Despite two extensions, the program remained incomplete one and a half weeks after the initial due date.

Pardasani alleges that the restrictions for the new security systems and library access caused the delays. Despite these difficulties, Pardasani claims that the program was almost complete on October 19. Testimony of other witnesses contradict Pardasani. At first Pardasani claimed he could not complete the project without greater access and then he claimed he was almost finished. One system analyst testified that all the analysts knew the security restrictions and library access restrictions, but still had access to all the tools and information required to complete assignments. Data Processing Systems Supervisor Truhett testified that Pardasani called him one weekend asking for information to circumvent the security system for working on the tag print program. Truhett told Pardasani to ask McLendon for permission, which Pardasani never did.

The Monday following this conversation, at McLendon's direction, Truhett took over the tag print program and found first that Pardasani had not progressed to the extent represented and second that completion was possible without violating the security system, despite Pardasani's claims to the contrary. As a result of Pardasani's

failure to complete the program, McLendon asked him to turn over the project on October 19, 1987. At first Pardasani refused to do so, keeping to himself the information and location of ICCF libraries needed to complete the project. After McLendon asked a few more times, coupled with a threat of termination for failure to comply with the Manager's orders, Pardasani agreed to turn over all of the requested information. When McLendon received the information from Pardasani, McLendon understood that he had all the necessary information, however, later that same day Pardasani advised McLendon in writing of additional information needed to complete the program.

This last turn of events prompted McLendon to meet with Goryl and discuss Pardasani's performance, specifically McLendon's loss of trust in Pardasani and fear for the security of the data processing information. After speaking with several corporate officials, Goryl decide (sic) to terminate Pardasani for insubordination and unsatisfactory work performance. Pardasani was terminated October 23, 1987. McLendon and other existing system analysts assumed Pardasani's duties. Approximately two years later, a systems analyst was hired at a comparable level.

On October 26, 1987, Pardasani filed a second charge with the EEOC, alleging that his termination was in retaliation for his first charge with the EEOC. He then filed suit against Siemens in April 1989. The district judge granted Siemens' Motion to Dismiss on Pardasani's claims for religious discrimination, defamation, intentional infliction of emotional distress, and violation of 42 U.S.C. § 1981.

The case regarding the age, race (sic) national origin discrimination and the retaliatory termination was tried before a magistrate judge. At the conclusion of Pardasani's case, his claims of age and race discrimination were dismissed. After trial the court dismissed plaintiff's remaining claims of national origin discrimination and retaliation finding that the plaintiff failed to make his *prima facie* case. Pardasani appeals only this last dismissal.

III.

Pardasani raises two issues before this court. First, he argues that the district court erred in focussing on the *prima facie* case once the defendant had presented his evidence. Instead, he contends the magistrate judge should have focused on the ultimate issue of discrimination. Pardasani's second argument is that the district court applied the wrong standard for reviewing the claims. According to Pardasani, the district court should have applied the "mixed motive" standard announced in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), instead of the test outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

A. *Standard of Review*

The clearly erroneous standard applies to the district court's finding on discrimination. *See Barnes v. Yellow Freight Sys.*, 830 F.2d 61, 62 (5th Cir. 1987). This Court must review findings of fact under the same standard. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985).

B. *The District Court Was Correct to Dismiss Plaintiff's Claims for Failure to Make a Prima Facie Case*

Pardasani argues that under *United States Postal Service Bd. of Governor (sic) v. Aikens*, the court should not have focused on the issue of plaintiff's *prima facie* proof once it heard the case on the merits. In *Aikens*, the Supreme Court held that when a defendant in a discrimination case loses a motion to dismiss or a motion for directed verdict and then offers evidence of legitimate, nondiscriminatory reasons, the factfinder must then decide the ultimate issue of discrimination. *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983). Once the defendant presented his evidence, the plaintiff's *prima facie* case is no longer the issue.

The court's initial denial of the motion to dismiss does not preclude a later determination that the plaintiff did not make out a *prima facie* case after all. In *Weissinger v. United States*, 423 F.2d 795 (5th Cir. 1970), this Court held that denying a defendants motion at the end of plaintiff's case is merely a tentative finding that plaintiff met his burden. *Id.* at 797-98. Denying a motion to dismiss does not preclude the trial judge, at the conclusion from findings and determinations at variance with the prior tentative rulings. *Id.*

In this case, after receiving defendant Siemens' evidence regarding Pardasani's work performance and termination, the court could correctly find that the plaintiff failed to prove all the elements of his *prima facie* case. Specifically, the court found that Pardasani was not qualified for his position, a necessary element in his *prima facie*

case for national origin discrimination involving his promotion and termination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[2](sic) In addition, evidence supports the court's finding that the plaintiff did not meet his burden of proving that he was replaced by a nonprotected class member. Nobody was promoted to senior analyst and nobody was hired in his position until two years after his termination.

Regarding the claim of retaliatory discharge, the district court correctly found that Pardasani failed to meet the third element of his *prima facie* case. Pardasani was required to show (1) that he was engaged in an activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision. *See McDaniel v. Temple Indep. School District*, 770 F.2d 1340, 1346 (5th Cir. 1985); *Jack v. Texaco Research Center*, 743 F.2d 1129 (5th Cir. 1984). In light of Siemens' evidence regarding the reasons for Pardasani's termination and the history of his performance, the court could find that plaintiff failed to prove any "causal connection" between his filing the EEOC claim and his discharge.

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[1] To establish a *prima facie* case of national origin discrimination regarding his evaluation or discharge, the plaintiff must prove (1) that he was a minority group member, (2) that he was qualified for the job or deserved a fair evaluation, (3) that he was discharged or suffered adverse treatment, and (4) that he was replaced by a nonminority group member or a nonminority group member received a better evaluation for the same work. *See McDonnell Douglas* at 801; *Davin v. Delta Airlines, Inc.*, 678 F.2d 567 (5th Cir. 1982).

After a discrimination case is fully heard on the merits, the court usually should not address the issue of plaintiff's *prima facie* case, but instead address the ultimate issue of discrimination. *Aikens* at 714-15. When, however, a court, upon hearing additional evidence regarding the plaintiffs qualifications and replacements, finds that the plaintiff failed to meet his initial burden, it may vacate an earlier finding and dismiss the case for failure to prove a *prima facie* case. Here the court correctly dismissed the actions for failure to prove a *prima facie* case. The record supports the court's findings. They are not clearly erroneous.

C. *The Defendant's Behavior Does Not Trigger the "Mixed Motive (sic) Test of Price Waterhouse v. Hopkins*

In its opinion, the district court stated that even if Pardasani had established a *prima facie* case of national origin discrimination or retaliatory discharge, he had failed to show pretext after the defendant's showing of legitimate, nondiscriminatory reasons for the termination and evaluation. Pardasani argues that the court should not have applied the pretext test in *McDonnell Douglas*, but instead applied that "mixed motive" test announced in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989). Because Siemens' behavior does not justify bypassing *McDonnell Douglas*, the court correctly refused to apply the *Price Waterhouse* test.

In *Price Waterhouse*, the Supreme Court held that an employer may still be liable for discrimination if its legitimate reasons for hiring or firing are mixed with

nonlegitimate reasons. *Id.* at 1795. If the plaintiff can prove that a discriminatory purpose played a part in the defendant's decision, the burden is then upon the defendant to show that the same decision would have been made absent the discriminatory purpose. *Id.*

It is plaintiff's contention that the district court should have applied this mixed motive standard to find against Siemens, despite the defendant's evidence of legitimate, nondiscriminatory reasons. This Court has recognized that *Price Waterhouse* requires a new standard of proof for mixed motive discrimination cases, but it has also recognized, as the Supreme Court did, that not all cases are mixed motive. Some remain pretext cases. *See Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989). Before a trial court applies the mixed motive test, it must find that the case involves mixed motive. *Price Waterhouse* at 1789 n.12. If the plaintiff does not establish that the discriminatory purpose played a motivating part, then he or she must show pretext. *Id.*

In *Young v. City of Houston, Texas*, 906 F.2d 177 (5th Cir. 1990), this Court addressed the proof necessary to show that a mixed motive exists. Citing *Price Waterhouse*, we held that the employee must show that the employer actually relied on the protected factor when making its decision. Stray remarks regarding stereotypes alone are not sufficient. *Id.* at 182. In that case statements that Young was a "white token" and "white faggot" did not trigger the mixed motive test. These statements did not rise to the level of racist animus necessary to bypass *McDonnell Douglas*. *Id.* at 181.

Pardasani alleges that the statement "If I get rid of the minorities out there, I'll be pressed to hire another," allegedly made by McLendon sufficiently demonstrates national origin animus. The district court obviously did not find that this statement sufficed to bypass *McDonnell Douglas*. The alleged statement does not constitute the level of ethnic animus established in *Walsdorf v. Bd. of Commissioners*, 857 F.2d 1047 (5th Cir. 1988). *Walsdorf* affirmed the grant of Title VII relief to a woman who was not promoted. In that case, the supervisor said about the plaintiff, "ain't no bitch going to get this job." The statement in today's case which Pardasani suggests is equal, is not. Therefore he was required to demonstrate pretext or produce more specific evidence of intentional discrimination under *McDonnell Douglas*.

D. *The District Court Correctly Allowed the Claim Based on National Origin Discrimination to Go Forward.*

Siemens argues that because Pardasani did not check the box next to national origin on the EEOC charging form, Pardasani is precluded from basing a suit on that claim. The court correctly found that Pardasani's mistake did not bar his claim.

This Court has held that failure to check a box on an EEOC form does not preclude a plaintiff's Title VII claim. *See Galvan v. Bexar County, Texas*, 785 F.2d 1298 (5th Cir. 1986); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). Siemens had adequate notice regarding Pardasani's EEOC charges and a mere technicality does not preclude Pardasani's bringing this suit.

IV.

The judgment appealed from is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

DAYAL PARDASANI Plaintiff	)	
v.	)	CIVIL ACTION NO.
SIEMENS ENERGY AND AUTOMATION, INC.,	)	J89-0246(L)
Defendant	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

BACKGROUND

This matter is before the Court as the result of plaintiff Dayal Pardasani's ("Pardasani" or "plaintiff") Second Amended Complaint filed on August 15, 1989, complaining about disparate employment conditions and his termination by defendant, Siemens Energy & Automation, Inc. ("Siemens" or "Company"), on the basis of his race, national origin, age, religion and retaliation for filing a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). Plaintiff also complained of alleged defamation and intentional infliction of emotional distress. Pursuant to Defendant's Motion for Summary Judgment, the Court dismissed plaintiff's claims under 42 U.S.C. § 1981 and his religious discrimination claims, defamation claims, and claims of intentional infliction of emotional distress by Memorandum Opinion and Order dated June 27, 1990.

Pursuant to the parties' agreement, the parties stipulated to a hearing before and entry of judgment by the undersigned U.S. Magistrate. The trial was conducted on October 10, 11, 12 and 18, 1990. Following the plaintiff resting his case, defendant moved for a directed verdict and the Court dismissed plaintiff's claims concerning age discrimination and race discrimination on the basis that the plaintiff had presented no credible, material evidence that plaintiff had been discriminated against because of his age or race (as distinguished from his national origin, Indian). Upon consideration of the entire record in this case, the Court hereby affirms its dismissal of plaintiff's race and age discrimination claims.

The plaintiff called seven witnesses who introduced 41 exhibits. Siemens called six witnesses and introduced 69 exhibits. Upon considering the testimony of plaintiff's and defendant's witnesses, including their demeanor and credibility and the relationship of each individual's testimony to that of other witnesses and the exhibits, including logical inferences which can be drawn from them, the Court hereby makes the following findings:

II.

FINDINGS OF FACT

Mr. Pardasani was hired by Siemens on November 23, 1981 as a systems analyst. Siemens considered his job performance satisfactory through early 1986. From 1982 through 1985, Pardasani received favorable annual evaluations on his performance from his supervisor, the Manager of Information Systems, Norm Smith.

The Information Systems Department (herein referred to as "the Data Processing Department") did not actually produce products sold by Siemens, but provided data processing services to all of the departments in Siemens' Jackson facility. Siemens' Jackson facility employs approximately 575 employees engaged in the assembly and manufacture of large electrical and electro-mechanical devices such as transformers and related electrical distribution equipment for utility companies.

As a systems analyst, Mr. Pardasani's job involved receiving assignments from his departmental supervisor (herein referred to as the "Data Processing Manager"). Specifically, when a user of data processing services in another department requested that an existing computer program be changed or a new program written to perform certain functions relating to their department's activities, it was Mr. Pardasani's responsibility to understand the user's "concept" concerning what the user wanted to accomplish with a computer program, and to transform that concept into logical computer language so as to create a new program or modify an existing program to achieve the user's objectives.

In early 1986, Siemens became dissatisfied with the Data Processing Manager's operation of the Data Processing Department as well as his job performance. Data Processing Manager Smith was given the option of either resigning or being terminated; Mr. Smith elected to resign. Around July, 1986, senior systems analyst Tom McLendon, the most senior employee in the Data Processing Department, became Acting Data Processing Manager at least with respect to the "applications" side of the

department as distinguished from the "systems" side. McLendon reported to Controller Bob Steil.

While Acting Data Processing Manager McLendon and plaintiff had worked together effectively for years, they had what the plaintiff characterized as a "sour" personal relationship.

Acting Data Processing Manager McLendon was advised that as part of his duties, he must conduct Pardasani's annual evaluation which was due October, 1986. Mr. McLendon protested that he had not worked with Mr. Pardasani long enough in a supervisory capacity to effectively evaluate his work. Nevertheless, Controller Steil advised him that he must evaluate the plaintiff. To do so, McLendon solicited user comments concerning the quality of Pardasani's work. User comments were received by the Acting Data Processing Manager from Manager of Production Control Charles Herrington, Supervisor of Drafting Paul Gardner, Accounts Payable Supervisor Debbie Jackson and Accounting Manager Al Woelfle, who formally judged plaintiff's performance to be unsatisfactory and especially unacceptable relative to his status as the most senior systems analyst.

Based upon these user comments, Acting Data Processing Manager McLendon completed his portion of the written evaluation around October 1, 1986 and met with plaintiff to discuss it. Plaintiff told McLendon that he would not accept his unsatisfactory rating of 2.3 on a 5 point scale since he considered the evaluation to be unfair. As a result of the unfavorable evaluation, Mr.

Pardasani received no raise in 1986-87. Pardasani attributed the user's complaints concerning his work to incorrect instructions from the users or incorrect use of his completed programs by them.

On December 1, 1986, Pardasani wrote a letter to Employee & Community Relations Manager Michael Goryl complaining of the evaluation. On December 16, 1986, Mr. Goryl met with Mr. McLendon and Mr. Pardasani concerning his evaluation. Mr. Pardasani explained the reasons why he felt the evaluation was unfair and McLendon, who had been promoted to Data Processing Manager on November 1, 1986, explained the reasons for his low evaluation. When Mr. Pardasani and Mr. McLendon were unable to agree to any changes in the evaluation, Employee and Community Relations Manager Goryl advised Mr. Pardasani that he could not change the evaluation since it was the Data Processing Manager's responsibility to complete it. Mr. Goryl added that he had been a user of Mr. Pardasani's services and had found them unsatisfactory also. Mr. Goryl's dissatisfaction was apparently the result of Mr. Pardasani's work on a pension program project in which the Employee & Community Relations Department encountered numerous problems which were reported to Mr. Goryl by Personnel Assistant John Lee, a black male, who was also dissatisfied with Mr. Pardasani's performance.

In early February, 1987, Mr. Pardasani was notified that his father, who resided in India, had died. Mr. Pardasani requested a leave of absence in order to return to India to tend to his family's affairs, and it was granted. Mr. Pardasani did not return from his leave of absence for over three weeks. Plaintiff did not have sufficient accrued

leave to be paid for the entire period; however, on Data Processing Manager McLendon's recommendation, Siemens approved payment of full salary for the additional time off that plaintiff did not have sufficient accrued leave to cover. Additionally, the plaintiff was absent an additional two and one-half days during this period and was delayed in coming to work for several hours during certain days. Data Processing Manager McLendon recommended and the Company approved payment of his full salary for these periods. Additionally, Mr. McLendon recommended and Siemens approved payment of a $1,000 advance, in addition to plaintiff's salary, in order that Mr. Pardasani could purchase the airline tickets necessary for his trip to India. Mr. McLendon was also involved in taking up a collection among data processing employees to assist Mr. Pardasani.

On May 29, 1987, Pardasani filed a charge with the Equal Employment Opportunity Commission alleging that he had been discriminatorily denied a fair evaluation and promotion to senior systems analyst on the basis of his race, age and religion. While Mr. Pardasani alleges that he was discriminatorily denied a promotion to a senior systems analyst position around January, 1987, he concedes that no one was ever promoted to that position and the only person who ever held the position of senior systems analyst was Mr. McLendon. The uncontroverted testimony of Company witnesses established that Siemens' officials made the decision not to fill the position in order to save money and the functions of the position were absorbed by Data Processing Manager McLendon, the previous incumbent, and other systems analysts.

Subsequent to plaintiff's 1986 performance evaluation and his meeting regarding the evaluation with Tom McLendon and Mike Goryl, plaintiff's work performance continued to decline. From January, 1987 through mid-September, 1987, Data Processing Manager McLendon continued to note performance problems and user complaints as shown in numerous memoranda from Mr. Pardasani's departmental and personnel files. However, plaintiff's performance problems were not serious enough to require consultation by Data Processing Manager McLendon with Mr. Pardasani.

Around August, 1987, Data Processing Manager McLendon was advised of the results of a Price Waterhouse auditor's report concerning Data Processing Department operations. The Price Waterhouse report recommended implementation of a security system to prevent more than one computer programmer/analyst working on the same program at the same time (frequently without the knowledge of the other programmer). Previously this practice had resulted in changes being made to a program which were unknown to the other programmer. The Price Waterhouse report also recommended restricting access to ICCF libraries (the actual locations in the computer where the programmer/analyst would work on changing programs or creating new ones).

Data Processing Manager McLendon placed Data Processing Systems Supervisor Dane Truhett in charge of writing the security system program. Dane Truhett solicited the ideas of all data processing employees concerning the security system. With McLendon's approval,

Truhett implemented the security system around September 21, 1987, although cosmetic refinements were made and bugs were eliminated from the system for the next several weeks.

During this same period, McLendon directed Truhett to implement ICCF library restriction rules which limited each programmer/analyst to no more than eight (8) of 99 libraries. Around September 23, 1987, the plaintiff learned that systems analyst Mark Anderson had access to more than eight (8) libraries. On September 25, 1987, Mr. Pardasani wrote a letter to Mr. Goryl complaining about McLendon's unfair treatment of him by giving Anderson access to more than eight (8) libraries while he was restricted to eight (8) libraries. However, when McLendon and Truhett became aware of Mark Anderson's additional access to ICCF libraries, on or about September 25, McLendon directed Truhett to immediately correct the problem, which he did. Accordingly, the evidence establishes that Mark Anderson's additional ICCF library access compared to that of other programmer/analysts lasted for only two days and was the result of an oversight by Dane Truhett. Also, the evidence indicates that Anderson never used his additional access to violate the security rules.

Around September 21, 1987, Mr. Pardasani was assigned the task of making certain changes to a tag print program. Pardasani estimated that the amount of time required to complete the project should be two weeks. However, at the end of two weeks he had not completed the project and requested an additional week. At the end of the additional week his work remained incomplete and he requested an additional three days. Again, McLendon

granted him additional time. However, notwithstanding the additional time, plaintiff's work on the project was not completed.

During this period, the plaintiff alleges that he was not able to work on the project because he did not have the necessary tools to complete work on the project because of the implementation of the security system and the ICCF library rules. The plaintiff claims that he had to violate the security rules in order to work on the project. Despite these difficulties, the plaintiff claims that on October 19 he had completed all changes in the tag print program and performed most of the necessary testing of the changes.

The plaintiff's testimony and testimony of other witnesses, especially Dane Truhett and Mark Anderson, contradict his assertions. While the plaintiff testified that he was denied access to the proper commands and tools necessary to make changes in the tag print program, at other points he testified that he had completed all necessary changes and was completing the testing phase on October 19, 1987. Systems analyst Anderson testified that all data processing programmer/analysts knew the security rules, knew the ICCF library restrictions, and had access to all information and tools necessary to perform their job functions. Data Processing Systems Supervisor Truhett testified that he received a telephone call from Dayal Pardasani on Saturday, October 17, 1987 at his home and Pardasani requested that Truhett provide him information to circumvent the security system in working on the tag print program. Truhett advised Pardasani that he did not have the authority to do that, but advised him

to call Data Processing Manager McLendon for authorization. Pardasani concedes that he never called McLendon for authorization or assistance. Truhett testified that while he could not condone violating departmental rules concerning the security system, he was available to provide Pardasani with any information he needed in order to work on his project. The following Monday, Truhett took over the tag print program project at McLendon's request and, contrary to Pardasani's testimony, found that the work had not progressed to the point represented by Pardasani, but that completion of the project required much time and effort over parts of the next six work days. Truhett testified, however, that he was able to complete the project without violating the security system.

As the result of Pardasani's failure to complete the project, on October 19, 1987, McLendon requested that Pardasani turn the project over to him with all necessary information, including the location of the information in ICCF libraries. Pardasani refused to do so. McLendon then went to Employee & Community Relations Manager Goryl's office and spoke with Goryl and Controller Steil who was also present. With Steil's concurrence, Goryl advised McLendon to return to the Data Processing Department, call Pardasani into McLendon's office, make the same request a third time and, if Pardasani did not turn over the information, make the same request a fourth time coupled with the threat of immediate termination for failure to comply with the Data Processing Manager's order. Although Pardasani once again refused to provide the requested information, upon being advised of the consequences for another refusal, Pardasani agreed to turn over the requested information. Pardasani then

gave the information to McLendon, and left him with the understanding that he had received all of the information concerning the tag print program project.

Later that day, McLendon received a written statement from Pardasani advising him of additional information needed to finish the tag print program project. Upon receipt of this information, McLendon met with Employee and Community Relations Manager Goryl advising him that he had lost confidence in Pardasani and feared for the security of the data processing information in the department. He recommended to Mr. Goryl that Pardasani either be transferred out of the department or terminated.

Mr. Goryl spoke with several corporate officials concerning the situation, including Controller Steil, acting General Manager Jim Malia, Associate General Counsel Mike Williamson, Manager of Industrial Relations Bruce Petterson at Siemens' headquarters in Atlanta, Georgia, and other corporate officials. Goryl decided that Pardasani should be terminated on the basis of insubordinate conduct and unsatisfactory job performance. Siemens' officials uniformly concurred in Mr. Goryl's decision. Goryl prepared a letter of termination which Mr. McLendon signed. Mr. Pardasani was terminated on October 23, 1987.

On October 26, 1987 Pardasani filed a second charge with the Equal Employment Opportunity Commission alleging his termination was in retaliation for filing his May 29, 1987 charge of race, age and religious discrimination.

Plaintiff claims that statements by McLendon show animus against him because he is a member of a minority group, i.e. , Indian. However, Mr. McLendon's comments concerning Indian dress and an Air India bombing incident reveal no animus towards Indians as a people. Moreover, these comments are alleged to have been made by Mr. McLendon at a time when he was not a management representative. None of these comments were directed to Mr. Pardasani individually, and none were the subject of a complaint by Mr. Pardasani to Siemens.

Mr. Pardasani claims that certain racial jokes or remarks demonstrate national origin animus against him. However, the racial remarks/jokes referred to by Mr. Pardasani and certain witnesses did not involve Indians and generally were made at a time when Mr. McLendon was not a management representative. Further, black witnesses, John Lee and Nathan Slater, testified that they considered Tom McLendon a friend and, although neither are presently employed by Siemens', they continue to enjoy a personal social relationship with him. Additionally, all witnesses testified that the racial remarks were made in the context of jokes among friends and that the plaintiff was neither the object of nor a participant in the remarks/jokes.

With respect to the plaintiff's job performance, four witnesses, Manager of Production Control Herrington, Accounting Manager Al Woelfle, Accounts Payable Supervisor Jackson and Supervisor of Drafting Paul Gardner, testified as to plaintiff's continuing unsatisfactory job performance through his date of termination. Indeed,the plaintiff's own witnesses, Data Processing Systems Supervisor Truhett, Systems Analyst Anderson

and Systems Analyst Slater testified that Pardasani's job performance was unsatisfactory and/or he was the worst systems analyst in the department in 1986-87 even though he was the most senior analyst.

Following his termination, the plaintiff's duties were assumed by Data Processing Manager McLendon and other systems analysts. Approximately two years later, a systems analyst was hired at a comparable level.

III.

CONCLUSIONS OF LAW CONCERNING PLAINTIFF'S CLAIMS

A. Discriminatory Evaluation Claim

Plaintiff alleges disparate treatment. The burden of proof in disparate treatment cases is set forth by the United States Supreme Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The plaintiff bears the burden of presenting a *prima facie* case of discrimination. Once a *prima facie* case is established, the burden of production shifts to the employer to articulate a legitimate non-discriminatory reason for the alleged adverse treatment. Once the defendant articulates a legitimate non-discriminatory reason, the plaintiff bears the burden of proving the articulated reason is a pretext for discrimination. At all times, the plaintiff bears the burden of proving, by a preponderance of evidence, that he was a victim of intentional discrimination.

To establish a *prima facie* case of national origin discrimination, plaintiff must show: (1) that he was a minority group member; (2) that he was qualified to receive a

better evaluation; (3) that he suffered adverse treatment; and (4) after receiving adverse evaluation, the employer gave a better evaluation to a non-minority group member who had performed similar work or engaged in similar conduct as that which caused plaintiff's low evaluation. See *Davin v. Delta Airlines*, 678 F.2d 567 (5th Cir. 1982); *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973).

Assuming the plaintiff established a *prima facie* case, the defendant articulated a legitimate non-discriminatory reason for the plaintiff's low rating – it was based upon the user's comments. Plaintiff presented no evidence that the user's comments were a pretext for intentional discrimination. Indeed, the plaintiff stated that he was on good terms with all of the Siemens' representatives who testified about his unsatisfactory work performance and Mr. Pardasani conceded that they had not discriminated against him.

B. Failure to Promote Claim

Plaintiff presented no facts to support his claim that Siemens failed to promote him to Senior Systems analyst because of his national origin and therefore, failed to establish a *prima facie* case of discrimination. There is no evidence that there was ever any vacancy by which he could have suffered an adverse personnel action. There is no evidence that any non-minority was ever promoted to Senior Systems Analyst. Clearly, the plaintiff cannot meet the second, third and fourth elements necessary to establish a *prima facie* case. See *Davin v. Delta Airlines, supra; McDonnell Douglas Corp. v. Green, supra.*

C. The Plaintiff's Termination

In order to establish a *prima facie* case of national origin discrimination concerning his termination, the plaintiff must show: (1) that he was a minority group member; (2) that he was qualified for the job; (3) that he was discharged; and (4) after his discharge, the employer either hired a non-minority group member to replace him or retained a non-minority group member who had engaged in conduct similar to that which caused the plaintiff's termination. *Davin v. Delta Airlines, supra; McDonnell Douglas Corp. v. Green, supra.* The plaintiff failed to establish the second and fourth elements of his *prima facie* case. Although the plaintiff insists that he was qualified for his job, Siemens found his performance, behavior and attitude, including insubordinate conduct, unacceptable. Mr. Pardasani's opinion of job performance is based exclusively upon his own perception. Indeed, his perception of satisfactory job performance during 1986-87 was not even shared by his own witnesses. However, the uncontroverted testimony of Siemens' witnesses was that they considered his job performance unacceptable. At the time of his termination, plaintiff was not performing his job at a level which met Siemens' legitimate expectations. *Elliott v. Group Medical & Surgical Service,* 714 F.2d 556 (5th Cir. 1983); *Kephardt v. Institute of Gas Technology,* 630 F.2d 1217, 1219 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981).

Additionally, the plaintiff was not replaced at the time of his termination. Mr. Pardasani presented no evidence that any other employee, especially a non-minority employee, violated security rules, was insubordinate, did

not timely finish projects, was considered to have unacceptable job performance and was retained while the plaintiff was terminated. Indeed, plaintiff failed to present any evidence of a non-minority employee receiving better treatment under similar circumstances, while the defendant presented substantial evidence that Company policies were enforced, and that both minority and non-minority employees violating company policies were terminated.

The plaintiff's case concerning his termination appears to be premised on the theory that he was discharged for not completing the tag print program project on October 19, 1987. Since the plaintiff alleges that he was discriminatorily denied the tools necessary to complete the project, he asserts that his discharge for failing to complete the project was discriminatory. However, the uncontroverted testimony of Company witnesses establishes that the immediate cause of termination was plaintiff's insubordinate refusal to turn over requested project information on October 19, coupled with his subsequent release of additional information which was supposed to have been furnished previously that same day.

The testimony of plaintiff's witnesses, Dane Truhett, Mark Anderson and Nathan Slater, contradicts plaintiff's claims that he was discriminatorily denied access to tools and commands needed to complete the tag print program project. Even assuming plaintiff established a *prima facie* case of discrimination, defendant's assertion that the immediate reason for termination was plaintiff's insubordinate conduct coupled with Data Processing Manager McLendon's loss of confidence in him constitute legitimate, lawful reasons for his discharge. Plaintiff has failed

to produce any evidence indicating that defendant's proffered and (sic) immediate reason for discharge was a pretext for discrimination.

D. Retaliatory Discharge Claim

In addition to his national origin claim, plaintiff asserts that he was discharged in retaliation for filing a May 29, 1987 charge of discrimination with the EEOC.

To establish a *prima facie* case of unlawful retaliation, plaintiff must show: (1) that he was engaged in an activity protected by Title VII; (2) that an adverse employment action occurred; and (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision. *McDaniel v. Temple Independent School District*, 770 F.2d 1340, 1346 (5th Cir. 1985); *Jack v. Texaco Research Center*, 743 F.2d 1129 (5th Cir. 1984); *McMillan v. Rust College, Inc.*, 710 F.2d 1112 (5th Cir. 1983).

The plaintiff's evidence does not establish a *prima facie* case because it does not show a "causal connection" between his May 29, 1987 EEOC charge and his October 23, 1987 termination. Apparently, plaintiff's employment continued without incident at the time he filed his first EEOC charge until mid-September, 1987. While the plaintiff testified that he believed Data Processing Manager McLendon denied him the opportunity to attend educational programs during this period, plaintiff failed to identify any educational program conducted in the Data Processing Department from which he was excluded. Employee & Community Relations Manager Goryl testified without contradiction that the plaintiff made no

request to use the company's educational assistance program during this period although he had used it in the past.

While plaintiff apparently claims that he began having notes put in his personnel file after he filed his EEOC charge, this argument is refuted by the evidence showing that such notes were placed in his file both before and after he filed the charge.

Assuming the plaintiff established a *prima facie* case of retaliatory discharge, the plaintiff failed to establish that retaliation, rather than insubordination, was the immediate cause for termination. "Whether or not there were other reasons for the employer's action, the employee will prevail only by proving that 'but for' the protected activity [he] would not have been subjected to the action of which [he] claims. If the employee does not bear that burden of persuasion, [he] may not prevail." *Jack v. Texaco Research Center*, 743 F.2d at 1131; *McDaniel v. Temple Independent School District, supra ; Smalley v. City of Eatonville*, 640 F.2d 765, 769 (5th Cir. 1981).

Defendant articulated legitimate non-discriminatory reasons for termination and its right to dismiss the plaintiff irrespective of his protected Title VII activity. At the time of his termination, plaintiff displayed unsatisfactory performance; violated the Information System security rules; violated management directives regarding ICCF library management; and was insubordinate to his direct supervisor. Section 704(a) of Title VII cannot excuse plaintiff's unacceptable performance, departmental policy violations and insubordination.

IV.

CONCLUSION

For the above reasons, the Court's dismissal of plaintiff's age and race claims at the close of the plaintiff's evidence at trial are affirmed and the Court hereby dismisses plaintiff's remaining claims of national origin and retaliation discrimination against defendant with all cost being taxed against the plaintiff.

ORDERED AND ADJUDGED this the 3rd day of December, 1990.

signed Britt Singletary
UNITED STATES MAGISTRATE